

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CURTIS S. BANKS)	
Claimant)	
V.)	
)	
SPIRIT AEROSYSTEMS, INC.)	
Respondent)	Docket No. 1,068,210
AND)	
)	
INSURANCE COMPANY OF STATE OF)	
PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Claimant, through Roger A. Riedmiller, of Wichita, requests review of Administrative Law Judge Gary K. Jones' March 2, 2015 preliminary hearing Order. Eric K. Kuhn, of Wichita, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the February 26, 2015 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant alleges personal injury by repetitive trauma to his shoulders and upper back from June 2012 until September or October 2013. The judge denied benefits after finding claimant's work activities were not the prevailing factor in claimant's injury, medical condition and resulting disability.

Claimant requests the preliminary hearing Order be reversed, arguing he proved his repetitive work activities were the prevailing factor in causing his injury. Claimant further asserts the term "prevailing factor" is unconstitutionally vague. He contends having a physician determine the prevailing factor causing an injury unconstitutionally delegates power from the judge to a physician. Claimant requests the Board allow him to make a direct appeal to the Kansas Court of Appeals concerning such arguments. Respondent maintains the Order should be affirmed.

The only issue the Board may address is whether claimant's work activities were the prevailing factor in his injury, medical condition and resulting disability.¹

¹ The Board is not a court established pursuant to Article III of the Kansas Constitution and lacks authority to find a statute unconstitutional. We lack statutory authority to transfer this matter to the Kansas Court of Appeals. Claimant may preserve the arguments for future determination before a proper court.

FINDINGS OF FACT

Claimant, 55 years old, began working for respondent as a sheet metal mechanic in June 2012. Claimant described his job duties as highly repetitious and involving mostly overhead work.² Claimant testified his work caused him to develop pain and other symptoms in his shoulders and upper back.

Prior to his employment with respondent, claimant was a truck driver for three years. Claimant testified during this time, he never experienced any pain in his right shoulder and was able to pass and recertify his DOT status on several occasions.

On December 12, 2013, claimant saw Daniel Prohaska, M.D., an orthopedic surgeon. Claimant complained of right shoulder weakness, stiffness, loss of motion, catching, tingling, and sharp, stabbing and throbbing pain. Dr. Prohaska diagnosed claimant with right glenohumeral osteoarthritis and a right, complete and chronic atraumatic rotator cuff tear. Dr. Prohaska stated, "This has been a process that has been coming on for years. This has nothing to do with his work of the last 1-1/2 year[s] other than he now is having more symptoms doing a job he will not be able to physically tolerate."³ Dr. Prohaska also noted the same process was developing in claimant's left shoulder.

Claimant saw Pedro Murati, M.D., at his attorney's request, on February 24, 2014, for an independent medical examination (IME). Claimant complained of bilateral shoulder and upper back pain, left shoulder tightness and pain radiating down his right arm. Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome, bilateral shoulder rotator cuff tears, myofascial pain syndrome and thoracic sprain. Dr. Murati stated, "... within all reasonable medical certainty and probability, the prevailing factor in the development of his conditions are the series of repetitive traumas while employed at Spirit AeroSystems."⁴

A preliminary hearing was held on April 8, 2014. There was no record taken and the judge ordered an IME with David Hufford, M.D., which was performed on May 20, 2014. Dr. Hufford diagnosed claimant with right shoulder pain with rotator cuff tear and atrophy. Dr. Hufford indicated claimant's repetitious work for respondent aggravated a preexisting degenerative condition and stated, "The prevailing factor for his current symptomatology is the pre-existing degenerative condition with rotator cuff tears and atrophy of the musculature that can not be accounted for by the work activities in question."⁵

² See P.H. Trans., Cl. Exs. 2 and 4-9.

³ *Id.*, Resp. Ex. 1 at 3.

⁴ *Id.*, Cl. Ex. 12 at 6.

⁵ Hufford Report at 2.

On February 3, 2015, at respondent's request, claimant saw John Estivo, D.O., for an IME. Dr. Estivo diagnosed claimant with a preexisting right, chronic full thickness rotator cuff tear and degenerative joint disease. Dr. Estivo opined claimant's work for respondent may have aggravated his underlying degenerative condition, but was not the cause. Dr. Estivo stated, "[T]he prevailing factor regarding this patient's right shoulder symptoms would be his preexisting chronic rotator cuff tear with osteoarthritis to the right shoulder."⁶

In the March 2, 2015 preliminary hearing Order, the judge stated, in part:

The evidence showed that the Claimant did repetitious work for the Respondent that involved the use of the right shoulder. Although the Claimant was asymptomatic prior to working for the Respondent, the weight of the medical evidence convinces the Court that the Claimant had a pre-existing condition which is the prevailing factor for his repetitive trauma and medical condition. The opinions of Drs. Prohaska, Hufford and Estivo are persuasive.

The Court finds that the Claimant's work activities were not the prevailing factor for the injury by repetitive trauma to the Claimant's right shoulder. The Claimant's request for medical treatment and a change of physician is denied.

This Court finds that it does not have jurisdiction to decide any constitutional issue raised by the Claimant.⁷

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by repetitive trauma arising out of and in the course of employment.⁸ The burden of proof is on the claimant. The trier of fact shall consider the whole record.⁹

K.S.A. 2013 Supp. 44-508 provides, in pertinent part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. . . .

⁶ P.H. Trans., Resp. Ex. 2 at 5.

⁷ ALJ Order at 2-3.

⁸ K.S.A. 2013 Supp. 44-501b(b).

⁹ K.S.A. 2013 Supp. 44-501b(c).

(f)(2)(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The weight of the evidence supports the judge's ruling. Claimant's repetitive work was not the prevailing factor in causing his medical condition or resulting disability. Dr. Prohaska indicated claimant's work had nothing to do with claimant's condition other than claimant having increased symptoms. Dr. Estivo indicated claimant's work did not cause his condition. Dr. Hufford, the court-ordered physician, indicated claimant's chronic right shoulder injuries could not have developed during his work for respondent. Based on this evidence, this Board Member affirms the Order.

CONCLUSIONS

WHEREFORE, the undersigned Board Member affirms the March 2, 2015 preliminary hearing Order.¹⁰

IT IS SO ORDERED.

¹⁰ By statute, the above preliminary findings and conclusions of one Board Member are neither final nor binding and may be modified by all five Board Members in an appeal from a final order.

Dated this _____ day of April, 2015.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

ec: Roger A. Riedmiller
firm@raresq.com

Eric K. Kuhn
ekuhn@foulston.com
awaner@foulston.com

Honorable Gary K. Jones